No. 20377

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. RUTHERFORD, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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STATEMENT AS TO JURISDICTION

This is an appeal from an order of the district court holding appellant in contempt for refusing to testify in a pending government civil suit, United States v. Carnation Co. et al., Civil No. 2297, in the Eastern District of Washington. The contumacious conduct took place in a deposition proceeding in which appellant was subpoenaed by the government, and followed the court's denial of appellant's claim of privilege against self-incrimination based upon his assertion that his prospective testimony was not within the scope of the antitrust immunity statute, 15 U.S.C. 32. The

district court has jurisdiction of the government's suit under the False Claims Act (31 U.S.C. 231-233) and under Section 4A of the Clayton Act (15 U.S.C. 15a). The contempt order was entered on June 24, 1965, and the notice of appeal was filed on July 2, 1965. This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The essential facts of this case are not in dispute. Appellant is an employee of Carnation Company of Washington, a distributor of milk and milk products. In March 1962, Rutherford testified before a grand jury in the Eastern District of Washington which returned an indictment (R. 1-7) charging Carnation, Inland Empire Dairy Association, and an official of Inland with a conspiracy in violation of the Sherman Act in the sale of milk and milk products to Fairchild Air Force Base in Washington.[1/] Defendants were charged with fixing prices, allocating the business between Carnation and Inland, and submitting "noncompetitive, collusive and rigged bids for contracts to supply milk and other milk products to Fairchild" (R. 5). On

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1/ United States v. Carnation Company of Washington, et al., Criminal No. 8752, Eastern District of Washington, Northern Division. The indicted Inland official, J. M. Click, had testified before the grand jury but had done so under an express waiver of his immunity from prosecution. Rutherford had not made such waiver, and received immunity as a result of his grand jury testimony (R. 28). According to the government's response to defendants' interrogatories, Rutherford and Click were the company officials who communicated with each other about the bids for the Fairchild business, prior to their submission, in pursuance of the conspiracy.

August 16, 1962, the defendants were convicted upon their pleas of nolo contendere; Carnation and Inland were each fined $20,000, the Inland official was fined $2,500 (R. 8-10).

Shortly thereafter, on August 28, 1962, the United States filed the pending civil case against Carnation and Inland, seeking damages under the False Claims Act and under the Clayton Act (R. 11-22), resulting from the same conspiracy attacked in the criminal case. Both civil causes of actions allege conspiracies with regard to sales of milk and milk products to Fairchild beginning before July 1956 and up to December 31, 1960 (R. 5, 10). Under the False Claims Act, it is asserted that Carnation and Inland defrauded the United States by denying it the right and duty to let contracts for the sale of milk and milk products to Fairchild by means of competitive bidding; while keeping up the appearance of competition, defendants secretly allocated the business and submitted "noncompetitive, collusive and rigged bids" (R. 15-19). Under the Clayton Act, it is asserted that defendants agreed to fix prices on sales of milk and milk products to Fairchild, to allocate that business between them and "[t]o submit noncompetitive, collusive and rigged bids" for such contracts (R. 20-22).

In November 1964, the government subpoenaed appellant Rutherford for the purpose of taking his pretrial deposition testimony on

November 17, 1964.[2/] At that time, appellant refused to answer questions posed by counsel for the government concerning the alleged conspiracy and invoked the Fifth Amendment privilege against self-incrimination. Rutherford maintained that position despite the statement of government counsel that the witness had immunity and should answer the questions posed (Deposition of Robert E. Rutherford, pp. 2-4). Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, the United States then moved for a court order compelling the witness to testify on the ground that he was protected by the antitrust immunity statute, 15 U.S.C. 32.

On February 3, 1965, prior to this Court's opinion in Kronick v. United States, 343 F. 2d 426, the district court denied the government's motion, holding that 15 U.S.C. 32 did not apply to appellant's testimony in the pending civil suit because one of the counts was not brought under the antitrust laws, but under the False Claims Act (R. 28-33). Following the Kronick decision, the government moved for reconsideration by the district court (R. 34-35). Upon reconsideration, the district court ruled that the Kronick case was dispositive and required setting aside the

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2/ Prior thereto, Rutherford had been subpoenaed by defendant Inland. His refusal to testify in response to that subpoena on the ground that he was not protected by the immunity statute had been sustained by the district court (R. 24-25).

previous order; the court held that Rutherford would obtain complete immunity under 15 U.S.C. 32 for testimony in the deposition and ordered him to testify (R. 41-49). The district judge required the deposition to be in open court so that he could rule upon the materiality of the questions to the antitrust cause of action (R. 42).

Appellant was then again subpoenaed by the government for the purpose of taking his deposition testimony (R. 47). This hearing took place on June 23, 1965. Upon Rutherford's continued refusal to answer the questions propounded, the district court held him in contempt of court. In his order, Judge Powell certified that he "saw and heard the conduct constituting the contempt . . . and that it was committed in the actual presence of the Court" (R. 50-52; Transcript, June 23, 1965). The order sentenced appellant to imprisonment for a term of 90 days, but suspended execution of the sentence pending appellate review, with the additional provision that in the event the order is sustained on appeal Rutherford "shall be afforded an opportunity to purge himself of said contempt" within 60 days from the affirmance (R. 52).

ARGUMENT

The issue on this appeal is whether the pending government suit, United States v. Carnation Co., et al., is a "proceeding" or "suit" under the antitrust laws within 15 U.S.C. 32, so that appellant Rutherford will obtain immunity from prosecution with regard

to any matter about which he testifies. If the answer is yes, as we believe it is, District Judge Powell correctly directed appellant--a crucial government witness--to testify and held him in contempt for refusing to do so.

It should be noted that Rutherford has already testified once, in the grand jury investigation which led to the indictment and conviction of Carnation Co. (his employer) and others upon essentially the same charges involved in the present case. Rutherford's prior testimony has admittedly given him immunity from prosecution under 15 U.S.C. 32; and, since the grand jury hearing took place in March 1962, and the pending civil complaint alleges conduct ending December 31, 1960 (R. 15, 20), it is probable that the existing immunity is sufficient to protect him. However, because appellant may be asked about subsequent events as a matter of corroboration, or upon cross-examination, the court below properly passed upon the applicability of the immunity statute to the pending civil suit.

On the merits, appellant fails to discuss, or cite, this Court's recent opinion in Kronick v. United States, 343 F. 2d 436, upon which District Judge Powell expressly relied in adjudicating the contempt. Kronick, like the present case, involved the refusal of a witness to testify in a civil action for damages brought by the United States under the Clayton Act and for fraud, and raised the adequacy of the immunity from prosecution provided by 15 U.S.C. 32. The Court's

decision affirming the contempt implicitly and correctly assumed, contrary to appellant's argument here, that a government suit for damages under the antitrust laws is one to which the antitrust immunity statute applies (Point I, infra). The Court in Kronick expressly resolved another issue presented on this appeal, holding that 15 U.S.C. 32 provided adequate immunity from future prosecution notwithstanding the coupling of the antitrust claim for damages with one for fraud arising out of the same facts (Point II, infra).

Appellant's further contentions that the immunity which he has already received for testifying before the grand jury is not adequate (Point III) and that the immunity statute is unconstitutional (Point IV) are plainly without merit.

I

A GOVERNMENT ACTION FOR DAMAGES UNDER THE ANTITRUST LAWS IS A "PROCEEDING" OR "SUIT" UNDER SUCH LAWS WITHIN 15 U.S.C. 32, SO THAT PERSONS TESTIFYING THEREIN RECEIVE IMMUNITY FROM PROSECUTION

The antitrust immunity statute, as presently codified in 15 U.S.C. 32 provides:

> No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title [the Sherman Act] and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title [Wilson Tariff Act]; Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. 3/

3/ Act of February 25, 1903, c. 755, §1, 32 Stat. 904, 15 U.S.C. 32.

The plain terms of that act show that it applies to government actions for damages under the antitrust laws, i.e., the second count in the present complaint, and that a witness testifying in such suit obtains immunity from prosecution. A government action for damages based upon violations of the Sherman Act is brought under Section 4A of the Clayton Act of 1914, as added in 1955, 69 Stat. 282, 15 U.S.C. 15a. In the language of 15 U.S.C. 32, the Clayton Act is plainly "amendatory . . . and supplemental" to the Sherman Act[4/] and a government damage action of course falls within "any proceeding, suit or prosecution" under such law as much as a government civil action for injunction, concededly covered by the immunity provision. Since a witness in such suit obtains full immunity, there is no risk of self-incrimination and he can be compelled to testify.

Appellant, however, asserts that the immunity granted under 15 U.S.C. 32 does not apply in a civil damage suit by the United States. It points out that the language now in Section 32 was enacted as a proviso to an appropriation measure which provided $500,000 "for the enforcement" of the Sherman Act and other laws, to be spent by the Department of Justice "to conduct proceedings, suits,

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4/ The Clayton Act was explicitly designated by Congress as "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", with specific reference to the Sherman Act, 38 Stat. 730.

or prosecutions under said Acts in the Courts of the United States."[5/] Its syllogism is that civil damage suits are not for the purpose of "enforcing" the antitrust laws but for compensating the United States (Br. 19-20); Section 32 applies only to proceedings for the "enforcement" of the antitrust laws (Br. p. 15); and it concludes, therefore, that the immunity provision does not apply here.

Appellant's reasoning is unsound. The term "enforcement" of the 1903 Appropriations Act is not language of limitation. Rather, it characterizes all acts of the Department of Justice in bringing criminal and civil proceedings under the antitrust laws. The governmental responsibilities for antitrust enforcement are unitary, and cannot be divided between criminal and civil proceedings, or between injunction and damage suits. This has been acknowledged, for example, in decisions sustaining the right of the Department of Justice to use grand jury evidence in civil damage cases as well as in injunction suits and criminal prosecutions (United States v.

5/ The original 1903 Act provided as follows:

> That for the enforcement of the provisions of the [Interstate Commerce] Act * * *, * * * the [Sherman] Act * * * and * * * [the antitrust provisions of the Wilson Tariff] Act, * * * the sum of five hundred thousand dollars * * * is hereby appropriated, * * * to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: Provided, That no person shall be prosecuted or subjected to any penalty or forfeiture for any or on account of any matter concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said Acts * * *.

General Electric Co., 209 F. Supp. 197, 199 (E.D. Pa.); In re Petroleum Industry Investigation, 152 F. Supp. 646 (E.D. Va.)). On the same theory, the intent of Congress in the antitrust immunity statute, to enable the Attorney General to obtain testimony by offering immunity from prosecution, Heike v. United States, 227 U.S. 131, 142, is not limited to particular classes of actions but applies to all government "proceedings, suits, or prosecutions" under the antitrust laws, and therefore includes a damage suit under Section 4A of the Clayton Act.

Since appellant places such heavy emphasis upon the meaning of the term "enforcement", it is well to note that Congress recognized the important enforcement effect of government antitrust damage suits, when it authorized such actions in 1955. S. Rep. 619, 84th Cong., 1st Sess., p. 3 (infra, p.13). And it has since that time continued to designate the Antitrust Division appropriation as one "for the enforcement" of the antitrust laws (e.g., Appropriations Acts for fiscal years 1964 and 1965, 77 Stat. 782, 78 Stat. 717), thus demonstrating its understanding of the role of government damage suits in the antitrust program. Congress realizes that fines in criminal cases are limited to a maximum of $50,000 and that damage recoveries play the essential role of taking the profit out of law violations. Damage recoveries often far exceed

the amount of the fines imposed and, indeed, we believe they will in this case.[6/]

Further, appellant's assertion that 15 U.S.C. 32 applies to all government antitrust proceedings except civil damage suits is rebutted by the legislative histories of the immunity provision, and of Section 4A of the Clayton Act.

An immunity statute was proposed as early as 1900, only a decade after enactment of the Sherman Act. At that time a House Committee reported to Congress that administration of the Act was "deemed insufficient" to deter violations, and it recommended, among other things, that immunity be granted in all "prosecutions, hearing, and proceedings under the provisions of this act, whether civil or criminal . . ." (H. Rep. 1506, 56th Cong., 1st Sess.). The Committee pointed out it was "extremely difficult to establish the existence of combinations or conspiracies" without the testimony or papers of persons "who are guilty parties thereto," and who can

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6/ Defendants Carnation and Inland were each fined $20,000 in the criminal case. As stated in response to defendants' interrogatories, the government seeks damages of about $296,000 on its antitrust claim, or about $696,000 in double damages and forfeitures under the False Claims Act. In the famous electrical equipment price-fixing conspiracy, General Electric Co. was fined a total of $437,500 on 19 convictions; it settled the government claims for damages for $7,470,000. While private treble damage suits also have an enforcement effect, and were so intended by Congress (Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-752), it is clear that the immunity provision of 15 U.S.C. 32 does not apply to testimony given in the course of them. H. Wagner & Adler Co. v. Mali, 74 F. 2d 666, 670 (C.A. 2); United States v. Standard Sanitary Mfg. Co., 187 Fed. 232 (E.D. Pa.). This is not, however, because of any distinction between damage and other suits. It is because Congress intended the immunity provision as a special tool of government enforcement to be utilized only by the Attorney General as shown by [Note continued next page.]

claim upon their Fifth Amendment privilege to withhold such evidence; the immunity provision was suggested as having "great utility in aiding in effectively enforcing all of the provisions of the Act" (id. at p. 2; 33 Cong. Rec. 6478).

When the immunity provision was enacted in 1903, along with the first appropriation specially earmarked for antitrust enforcement, it was again explained that immunity was needed to give the government "the means to secure the necessary proof" to establish the existence of illegal conspiracies (36 Cong. Rec. 411-419). Appellant protests that the 1903 Act "gives not a hint that immunity was to be given in a Section 15(a) civil suit by the United States" (App. Br. 16). At that time, of course, there was no specific provision in the law for government damage suits. But the immunity statute's operative language is sweeping; as noted it applies to all "proceedings, suits or prosecutions" under the antitrust laws. This breadth itself refutes any intent to limit the scope of the law to exclude any class of government suit then or later authorized. The assertion by a key witness of the privilege against self-incrimination poses common problems in all government antitrust proceedings and Congress was plainly concerned that all types of government antitrust proceedings be successful.

6/ [Footnote continued]

the context of the 1903 Act and by the legislative history subsequently set out (see also cases ibid.).

In 1955, Congress enacted Section 4A of the Clayton Act, 15 U.S.C. 15a, expressly to authorize government civil damage suits after the Supreme Court had held that the government could not sue under the existing law (S. Rep. 619, 84th Cong., 1st Sess., p. 3; H. Rep. 422, 84th Cong., 1st Sess., p. 3; see United States v. Cooper Corp., 312 U.S. 600). In so doing, Congress made several explicit distinctions between government damage suits and others, making inapplicable to the former the provisions for prima facie effect and tolling of statute of limitations (See Section 5 as amended in the same 1955 bill, 69 Stat. 283, 15 U.S.C. 16). It is apparent that if Congress had intended to prevent the applicability of the unambiguous language of the immunity provision to damage suits, it would have done so in similar express terms. Moreover, since, as already noted, Congress stressed the enforcement and deterrent aspect of government damage suits, along with the desirability of redressing the government's pecuniary losses, no hidden intent to modify the law may be inferred.

Accordingly, the enforcement aid provided by the immunity provision applies in this case. Appellant Rutherford can be compelled to testify, as he has already once been compelled before the grand jury, and the government damage suit should proceed without further unwarranted delay.

II

THE ANTITRUST IMMUNITY STATUTE WILL APPLY TO ALL OF APPELLANT'S TESTIMONY IN THE PENDING CASE OF UNITED STATES v. CARNATION CO., IN WHICH THE GOVERNMENT'S ANTITRUST CLAIM IS JOINED WITH ONE FOR FRAUD ARISING OUT OF THE SAME FACTS

We have shown that the antitrust immunity statute, 15 U.S.C. 32, applies to testimony given in government damage suits under the antitrust laws. The pending case of United States v. Carnation Co., in which appellant was directed to testify, is such a suit. Appellant contends, nevertheless, that the antitrust immunity provision does not protect him against subsequent prosecution because the antitrust cause of action in the government's complaint is joined with a cause of action under the False Claims Act, to which the immunity statute is inapplicable (Br. p. 24). Such a contention was explicitly rejected by this Court in the recent case of Kronick v. United States, 343 F. 2d 436. In that case, as here, the government asserted a claim under the antitrust laws and a claim under a fraud statute, 7/ based upon a single course of conduct. The Court

7/ In this case, the non-antitrust claim is under the False Claims Act, 31 U.S.C. 231, while in Kronick it was under the Federal Property and Administrative Services Act of 1949, 49 U.S.C. 489. Both of these acts cover frauds against the United States and prescribe the assessment of liquidated damages in similar terms, a fixed sum per violation plus double damages. The statute in Kronick is limited to fraud in the disposal of government property and other specified transactions, while the False Claims Act is the Civil War statute which covers generally the presentation of "false, fictitious or fraudulent" claims to the government and conspiracies to defraud the United States by such claims. The similarity of these statutes has been noted (see Rex Trailer Co., Inc. v. United States, 350 U.S. 148, 152, commenting on predecessor of the 1949 statute).

held unequivocally that any claim that the antitrust immunity statute was inapplicable because of the presence of the non-antitrust claim "would be without merit" (343 F. 2d at 441). As the Court declared (ibid.):

> The proof necessary to sustain both claims is substantially identical . . . . Under these circumstances it must necessarily be assumed that all of his testimony is germane to the antitrust claim and is therefore protected by section 32.

This language precisely covers the present case and disposes of appellant's contention. The antitrust and False Claims Act counts are sufficiently distinct in law so that both may be asserted, as we argued below (quoted in App. Br. 28, 29-30). However, the claims are clearly alternative characterizations of the same course of conduct (and the government would ultimately recover only under one of them). This is apparent from the allegations of the complaint. The antitrust claim charges an agreement to fix prices and to submit noncompetitive, collusive, rigged bids on the sale of milk and milk products to Fairchild Air Force Base (R. 20-21). The defendants' submittal of these noncompetitive, collusive and rigged bids, while representing that they were competitive bidders, also constituted the fraud which is alleged to have violated the False Claims Act (R. 15-19). Plainly, all the testimony sought by the government from Rutherford will be relevant to the antitrust claim and 15 U.S.C. 32 will provide him with immunity from prosecution for any

crime about which he testifies or to which his testimony leads.[8/] The court below properly directed Rutherford to testify on deposition and held him in contempt for refusing to do so, see F.R. Civ. P. 37(a), (b), F.R. Crim. P. 42(a).

III

SINCE APPELLANT WILL RECEIVE IMMUNITY FROM PROSECUTION FOR ANY CRIMES RELATED TO HIS FUTURE TESTIMONY IN THE PENDING CASES, THE SCOPE OF IMMUNITY RESULTING FROM HIS PRIOR GRAND JURY TESTIMONY IS IRRELEVANT

Appellant argues that, in the pending civil case, he may be asked questions which would involve him "in crimes committed subsequent to and following his testimony before the Grand Jury" (Br. 30). On that ground, he fears that the immunity with which he is clothed from his grand jury appearance would not protect him.

But the point of the decision below, and of our argument thus far, is that appellant's testimony in the pending civil case will give him a new and independent immunity under 15 U.S.C. 32. This additional immunity will, of course, be commensurate with the scope

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8/ This case, therefore, does not present the problem which would be encountered if a government antitrust claim were joined with a non-antitrust claim arising from different facts. In such a situation, a witness would be entitled, at the least, to immunity with regard to any testimony arguably relevant to the antitrust claim, and to an adequate warning when the questioning leaves the antitrust issues so that he may assert his privilege against self-incrimination. Cf. Brown v. Walker, 161 U.S. 591, 605; United States v. Monia, 317 U.S. 424, 427; United States v. Onassis, 125 F. Supp. 190 (D. D.C.). In the present case, no such distinctions are necessary since all the relevant facts relate to the antitrust claim, covered by 15 U.S.C. 32.

of his forthcoming testimony in the civil case (Heike v. United States, 227 U.S. 131; United States v. Monia, 317 U.S. 424). The scope of his prior grand jury evidence is irrelevant to appellant's obligation to testify under the order below.

IV

THE ANTITRUST IMMUNITY STATUTE IS CONSTITUTIONAL

Appellant finally urges that the antitrust immunity statute is contrary to the Fifth Amendment's privilege against self-incrimination and "should now be held to be unconstitutional" (Br. 36). The Supreme Court, however, has consistently sustained immunity provisions in the form of 15 U.S.C. 32. Ullmann v. United States, 350 U.S. 422; McCarthy v. Arndstein, 266 U.S. 34, 42; Heike v. United States, 227 U.S. 131, 142; Brown v. Walker, 161 U.S. 591. While appellant terms Brown v. Walker as the "stumbling block to modern critical appraisals of immunity statutes" (Br. p. 38), the Supreme Court has unequivocally adhered to its approach. As Mr. Justice Frankfurter stated in Ullmann (350 U.S. at 437-438):

> Since that time the Court's holding in Brown v. Walker has never been challenged; the case and the doctrine it announced have consistently and without question been treated as definitive by this Court, in opinions written among others, by Holmes and Brandeis, JJ.

Since appellant's risk of self-incrimination by testimony in the pending case of United States v. Carnation Co. has been eliminated by the immunity afforded under 15 U.S.C. 32, the court below properly directed him to testify.

CONCLUSION

Accordingly, the judgment below, that appellant Rutherford was in contempt of court for refusing to testify in the pending case of United States v. Carnation Co., et al., Civil No. 2297 (E.D. Wash.), should be affirmed.[9/]

Respectfully submitted.

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Attorneys.

DECEMBER 1965

9/ Our conclusion is not affected by the recent Supreme Court decision in Harris v. United States, No. 6, O.T. 1965, December 6, 1965, 34 U.S. Law Week 4040. In that case, the Court held that contempt of a grand jury could not be punished summarily by a district judge under F.R. Crim. P. 42(a), as a contempt occurring "in the actual presence of the court" but had to be proceeded on notice and hearing under F.R. Crim. P. 42(b). In Harris, the district court had found an immunity statute applicable, rejected the witness' claim of Fifth Amendment privilege and directed him to answer in the court's presence. Justice Douglas stressed that "[t]he real contempt, if such there was, was contempt before the grand jury" and the judge's repeating of the questions served no purpose except to make summary contempt available when there was no need for swiftness (p. 3). Here, however, the deposition proceeding was properly before the district judge, the court having directed it to be in open court so that he could make immediate rulings upon the relevance of the questions to the antitrust claim, R. 42, F.R. Civ. P. 28. This was the judge's proceeding, and the contempt before him could be punished summarily, F.R. Civ. P. 37(a), (b)(1), F.R. Crim. P. 42(a).

It should be noted, moreover, that Rutherford has already had a hearing on the relevant question of immunity, under the procedures of Federal Civil Rule 37(a) and that Judge Powell has lessened the punitive aspect of his order by assuring the witness an opportunity to purge himself of the contempt after the appeal is resolved, R. 52; Transcript, June 23, 1965, p. 24.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney